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Supreme Court, U.S.
FILED

No. 09-___ 09-263 AUG 28 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER,

ATTORNEY GENERAL OF THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 28, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed a provision of the Immigration and Nationality Act that previously had allowed the Attorney General to waive deportation for immigrants convicted of certain otherwise deportable offenses. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held, as a matter of statutory construction, that Congress did not intend for Section 304(b)'s repeal to have retroactive effect. The questions presented are:

1. Whether this Court's construction of IIRIRA Section 304(b) as not applicable to pre-enactment convictions applies to all immigrants whose convictions predate IIRIRA's enactment, as the Third and Eighth Circuits have held, or whether Section 304(b)'s retroactivity instead (a) turns on an immigrant's subjective reliance, as the Eleventh Circuit here and two other courts of appeals have held; (b) turns on objectively reasonable reliance, as one court of appeals has held; or (c) is categorically inapplicable to convictions obtained at trial, as four circuits have held.

2. Whether the long-established presumption against retroactivity applies only when individuals can establish either subjective or objective reliance on prior law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sandra Ferguson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 563 F.3d 1254. The decisions of the Board of Immigration Appeals (App., *infra*, 30a-32a, 35a-38a) and the Immigration Judge (App., *infra*, 33a-34a, 39a-40a) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 31, 2009. On June 23, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 29, 2009. On July 16, 2009, Justice Thomas further extended the time for filing to and including August 28, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 41a-42a.

STATEMENT

1. Prior to 1996, an immigrant convicted of certain otherwise deportable offenses was entitled to seek a discretionary waiver of deportation from the Attorney General under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). That Section authorized the Attorney General to waive deportation or exclusion for immigrants who had a "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c) (1995); *see generally INS v. St. Cyr*, 533 U.S. 289, 295 (2001). "[A]

substantial percentage" of applications for Section 212(c) relief were granted. *St. Cyr*, 533 U.S. at 296.[1]

During the 1990s, Congress substantially revised the Nation's immigration laws. In 1990, Congress "amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *St. Cyr*, 533 U.S. at 297; *see* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052. Then, in 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, which foreclosed Section 212(c) relief for immigrants convicted "of one or more aggravated felonies." *Id.* § 440, 110 Stat. 1277. Later that same year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Section 304(b) of which repealed the Attorney General's waiver authority under Section 212(c) altogether. Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. Congress replaced the waiver provision with a "cancellation of removal" procedure that gave the Attorney General the authority to waive "removal" (*i.e.*, deportation or exclusion) for a very narrow class of immigrants, but precluded such relief for anyone "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

In *INS v. St. Cyr*, this Court held, as a matter of statutory construction, that Congress did not intend for IIRIRA Section 304(b)'s repeal of the waiver provision to have a retroactive effect. The Court held first that IIRIRA contained no "clear indication from Congress that it intended such a [retroactive] result." *Id.* at 316 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994)). The Court held secondly that

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[1] The Board of Immigration Appeals ("BIA") and courts have consistently held that Section 212(c) applies to deportable immigrants as well as excludable aliens. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

applying the statute to St. Cyr would give the statute a "retroactive effect" because it would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). In particular, because St. Cyr had pled guilty to a deportable offense at a time when the potential for waiver of deportation remained, and St. Cyr "and other aliens like him, almost certainly relied upon [the possibility of obtaining a § 212(c) waiver] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Applying the Court's "deeply rooted" "presumption against retroactive legislation," *id.* at 316, the Court accordingly held that Congress did not intend for its repeal of the waiver provision to apply.

2. Petitioner Sandra Ferguson was admitted to the United States as a lawful permanent resident in 1977, at the age of 11. App., *infra*, 3a. Almost a quarter century ago, in 1986, Ferguson was convicted, following a jury trial, of possessing and intending to distribute thirty grams of cocaine, in violation of Illinois law. *See* Ill. Rev. Stat. Ch. 56.5 § 1401-A(2) (1983). She was sentenced to six years imprisonment but was released after serving just two years and nine months. App., *infra*, 3a. At the time of her conviction, the offense subjected her to deportation, 8 U.S.C. § 1251(a)(11) (1989), but her continuous residence in the United States as a lawful permanent resident qualified her to seek a waiver of deportation from the Attorney General under Section 212(c).

A decade later, and two years after Congress's repeal of Section 212(c), the Government commenced removal proceedings against Ferguson. App., *infra*, 3a. The immigration judge found that Ferguson's prior conviction rendered her both removable and ineligible for cancellation of removal under IIRIRA. App., *infra*, 40a. The Board of Immigration Appeals agreed with those findings, *id.* at 36a,

37a, but remanded for the immigration judge to determine whether Ferguson qualified for the Attorney General's waiver of deportation under Section 212(c) based on this Court's then-recent decision in *St. Cyr*, *id.* at 37a.

On remand, the immigration judge found that IIRIRA's repeal of the waiver provision applied to Ferguson because her conviction followed a jury trial rather than a guilty plea. App., *infra*, 34a. The Board of Immigration Appeals affirmed based on the Attorney General's promulgation of a new regulation reading *St. Cyr* as limited to guilty pleas. App., *infra*, 30a-31a (citing 8 C.F.R. § 1212.3(f)(4)).

3. The court of appeals denied Ferguson's petition for review. App., *infra*, 29a. The court noted at the outset that the "circuits are split on how to apply *St. Cyr* to aliens outside of the guilty plea context." App., *infra*, 15a. Some circuits, the court explained, have held that "IIRIRA does not have an impermissible retroactive effect on aliens who relied on § 212(c) relief in deciding to go to trial." App., *infra*, 15a (citing *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284, 290-293 (4th Cir. 2002)).[2] The Second and Fifth Circuits, however, have held that, while IIRIRA's repeal has an impermissible retroactive effect on those who pled guilty prior to the statute's enactment, it generally has no retroactive effect as applied to immigrants convicted at trial, unless the immigrant makes an "individualized showing" of reliance on the availability of Section 212(c) relief in deciding whether to proceed to trial, in which case the statute's impermissible

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[2] The Seventh Circuit allows an exception for immigrants who went to trial but "conceded deportability before repeal" and can show "reliance on the possibility of § 212(c) relief." *See United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008).

retroactive effect reemerges. App., *infra*, 17a-19a. On the other hand, the Tenth Circuit "extends *St. Cyr* beyond the guilty plea context and rejects a requirement of actual, subjective reliance," in favor of a requirement of "objectively reasonable reliance." App., *infra*, 19a. "The Third Circuit, on the other hand, does not require aliens to show reliance or a reliance interest – either objective or subjective," holding instead that IIRIRA's repeal of Section 212(c) has a retroactive effect because "it attaches new legal consequences to an alien's criminal conviction" without regard to how that conviction was obtained. App., *infra*, 20a.[3]

Concluding that this Court "has refused to adopt a rigid, single test for determining whether a statute has an impermissible retroactive effect," the Eleventh Circuit here opted "to focus on the reliance elements, as laid out in *St. Cyr*" rather than the multi-factor retroactivity analysis "put forth in cases such as *Landgraf*." App., *infra*, 28a. The court then held that whether IIRIRA's repeal provision has a retroactive effect turns solely on whether the immigrant actually relied on the prior law in some "'transactions' or 'considerations already past.'" *Id.* at 29a; *see id.* ("We therefore hold that reliance is a component of the retroactivity analysis."). Finding no particularized evidence of reliance here, *id.* at 29a, the court of appeals denied the petition for review.

REASONS FOR GRANTING THE WRIT

This Court's review is necessary to resolve an ever-expanding and intractable conflict in the circuits on an important and recurring question of federal law that continues to affect thousands of individuals across the nation. Whether a statutory provision applies to pre-enactment conduct is

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[3] Since the court of appeal's decision, the Eighth Circuit has joined the fray and sided with the Third Circuit. *Lowan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6-*7 (8th Cir. July 31, 2009).

ultimately a question of statutory construction, and the longstanding "presumption against retroactivity" "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes," and affords "legislators a predictable background rule against which to legislate." *Landgraf*, 511 U.S at 272-273. In *St. Cyr*, this Court applied that established rule of statutory construction to hold that IIRIRA's repeal of Section 212(c)'s waiver provision was not intended to have retroactive effect. 533 U.S. at 326.

Like this case, *St. Cyr* involved a lawful permanent resident whose pre-IIRIRA conviction of a criminal offense rendered the alien deportable and ineligible for discretionary relief under IIRIRA's cancellation of removal provision. *Id.* at 293. At the time of both the underlying criminal conduct and of conviction, however, both St. Cyr and Ferguson were eligible to seek a waiver of deportation from the Attorney General under Section 212(c). The only difference is that St. Cyr's conviction was obtained through a guilty plea and Ferguson's through the exercise of her constitutional right to a trial. Based on that difference in how the immigrants' convictions were obtained, the courts of appeals have adopted widely varying decisions on IIRIRA Section 304(b)'s retroactive effect. As a result, a single provision of a single federal statute has divergent operation across the Country, resulting in profoundly life-altering differences in the law's effect for immigrants based on nothing more than geography. The sheer volume of cases raising the question and decrying the lack of clarity in retroactivity jurisprudence demonstrates the importance of this Court's intervention.

More broadly, the conflict in the circuits presented here is simply one example of widespread "substantial confusion" in the courts of appeals "as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive." *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004). The court of appeals' confusion is

rooted in this Court's precedent. *Ibid.* ("This confusion exists within the Supreme Court, in its decisions postdating *Landgraf*."). Accordingly, only this Court's intervention can bring needed uniformity and stability to federal law.

I. The Courts Of Appeals Have Splintered Over The Retroactivity Of IIRIRA's Repeal Of The Attorney General's Waiver Authority Under Section 212(c).

There is no dispute that Congress did not express in IIRIRA its intent that Section 304(b)'s repeal of the waiver provision have a retroactive effect. *See St. Cyr*, 533 U.S. at 320. The courts of appeals, however, are deeply divided over whether and when Section 304(b) has an "impermissible retroactive effect" as applied to convictions entered prior to IIRIRA's enactment following a jury trial, rather than a guilty plea.

The Eleventh Circuit's decision in this case adds to an existing disarray in the courts of appeals' cases. Prior to the decision here, five circuits had held that IIRIRA's repeal of Section 212(c) does not apply to at least some convictions obtained after trial, while four other circuits had held that the repeal applies to all convictions obtained through trial prior to 1996. Within the former group, the courts of appeals have sub-divided further with two courts of appeals holding that IIRIRA's repeal does not apply to any pre-enactment convictions, while three other circuits require some showing of either subjective or objective pre-enactment reliance.

A. Five Circuits Hold That IIRIRA's Repeal Provision Does Not Apply To Certain Cases Where The Immigrant Was Convicted After Trial.

1. The Third and Eighth Circuits Hold that IIRIRA's Repeal Provision Has No Application to Any Pre-Enactment Convictions.

Following this Court's lead in *St. Cyr*, the Third Circuit has construed IIRIRA's repeal of the Attorney General's waiver authority as not applying to convictions entered before 1996. *See Atkinson v. Att'y Gen.*, 479 F.3d 222 (3d Cir. 2007). Contrary to the Eleventh Circuit's holding here, the Third Circuit has recognized that "[n]owhere in the Supreme Court's jurisprudence * * * has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry." *Id.* at 231. For example, as the Third Circuit explained, in *Landgraf* itself this Court concluded that applying a new punitive damages remedy to pre-enactment conduct would have retroactive effect, even though it was implausible to think that the absence of a punitive damages remedy would have informed or influenced an employer's decision whether or not to engage in long-outlawed sexual discrimination in employment. *Id.* at 228.

The Third Circuit further noted that this Court followed a similar course in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), in which the Court held that the removal of a defense had a retroactive effect without requiring defendants to show that they had relied on the existence of the defense in their pre-enactment conduct. *Atkinson*, 479 F.3d at 228-229. The Third Circuit acknowledged that, although "reliance" "is an element to consider in determining whether the enactment of a new law" has a retroactive effect, cases like *Landgraf* and *Hughes* demonstrate that "whether the party before the court actually

relied on the prior state of the law is not the conclusive factor." *Id.* at 229.

Instead, the Third Circuit focused on the central *Landgraf* inquiry: whether the withdrawal of Section 212(c) relief "attached new legal consequences to [the immigrant's] conviction." *Atkinson*, 479 F.3d at 230. And the court concluded that, under the new law, the consequence of a prior deportable offense is *certain* deportation, whereas at the time of the offense the consequence was *possible* deportation that could be avoided by a successful application under Section 212(c). *Ibid.*; *see St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

Recently, the Eighth Circuit followed suit, expressly adopting the Third Circuit's position that IIRIRA's repeal provision does not apply to pre-enactment convictions, whether obtained through plea or trial. *Lovan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6-*7 (8th. Cir. July 31, 2009). What is critical, the Eighth Circuit explained, is that IIRIRA's repeal of Section 212(c)'s waiver program "attached a new legal consequence to [an immigrant's] conviction: the certainty – rather than the possibility – of deportation." *Id.* at *7.

Furthermore, in the closely analogous context of IIRIRA's application to convictions barring reentry into the United States, the Fourth Circuit has expressly adopted the Third Circuit's analysis and held that "reliance, in any form, is irrelevant to the retroactivity inquiry." *Olatunji*, 387 F.3d at 396. In the Fourth Circuit's view, what is controlling is that IIRIRA "attaches *new legal consequences*" to an immigrant's pre-enactment "*conviction*." *Id.* at 395, 396.[4]

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[4] Underscoring the depth of confusion in circuit law, other Fourth Circuit cases hold that a defendant convicted after trial is categorically ineligible for section 212(c) relief. *See Chambers v. Reno*, 307 F.3d 284,

2. The Second and Fifth Circuits Hinge Retroactivity Upon a Showing of Subjective Pre-Enactment Reliance.

While the Second and Fifth Circuits agree that IIRIRA's repeal of Section 212(c) can have a retroactive effect on convictions, regardless of whether they were obtained by trial or plea, those two circuits part company with the Third And Eighth Circuits by hinging their analysis on whether the immigrant can make an individualized showing of subjective reliance on the availability of Section 212(c) relief in deciding to proceed to trial. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). For example, the immigrant might have delayed applying for Section 212(c) relief "in order to establish a history of rehabilitation" that would improve her chances of obtaining relief. *Carranza-De Salinas*, 477 F.3d at 206; *see Restrepo*, 369 F.3d at 633.

3. The Tenth Circuit Holds that IIRIRA's Repeal Provision Does Not Apply to Cases Involving Objective Reliance on the Prior Law.

The Tenth Circuit likewise agrees with the Third, Eighth, Second, and Fifth Circuits that IIRIRA's repeal can have a disfavored retroactive effect when applied to pre-1996 convictions, regardless of the procedure by which they were obtained. The Tenth Circuit furthermore agrees with the Second and Fifth Circuits (in conflict with the Third and Eighth) that reliance is the key to whether the repeal has an impermissible retroactive effect. But unlike the Second and

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290-93 (4th Cir. 2002); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007). *Mbea*, decided several years after *Olatunji*, did not even mention that decision. *See Lovan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6 n.1 (8th. Cir. July 31, 2009) (noting the confusion in Fourth Circuit law); *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006) (noting the "tension between *Olatunji* and *Chambers*").

Fifth Circuits, Tenth Circuit law does not require the immigrant to make an individualized showing of subjective reliance. Instead, it is sufficient that the immigrant belongs to a class of individuals for whom reliance on the availability of Section 212(c) would be "objectively reasonable." *Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006). The Tenth Circuit thus considers, for example, whether the immigrant forewent an appeal in her criminal case, reasoning that it would be objectively reasonable for a defendant to forgo an appeal out of a concern that a successful appeal could lead to a new trial with a higher sentence that could render the defendant ineligible for Section 212(c) relief. *Id.* at 1199.

B. Four Circuits Hold That IIRIRA's Repeal Applies Categorically To All Defendants Convicted After Trial.

The First, Fourth (*but see note* 4, *supra*), Seventh, and Ninth Circuits have held that a defendant convicted after a trial is categorically ineligible for Section 212(c) relief on the ground that a guilty plea, rather than a conviction at trial, is an indispensable prerequisite to finding that IIRIRA's repeal has a disfavored retroactive effect. *See Dias*, 311 F.3d at 458; *Chambers*, 307 F.3d at 293; *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *Armendariz-Montoya*, 291 F.3d 1116, 1121 (9th Cir. 2002). Those courts of appeals have read *St. Cyr*'s holding to turn fundamentally on the immigrant's presumed reliance upon the availability of Section 212(c) relief in deciding to waive his right to trial. Because in those courts' view, the decision to go to trial would not entail that same presumed *quid pro quo*, those circuits have concluded that the repeal of Section 212(c) can be applied to convictions that pre-date IIRIRA's enactment without imposing a disfavored retroactive effect. *See, e.g., Dias*, 311 F.3d at 458; *Chambers*, 307 F.3d at 290.

The Seventh Circuit, however, has created a limited exception to its otherwise categorical rule. That court holds

that IIRIRA Section 304(b) does not apply to pre-enactment trial convictions if the immigrant "conceded deportability before repeal in reliance on the possibility of § 212(c) relief." *De Horta Garcia*, 519 F.3d at 661.

C. This Case Exacerbates The Circuit Conflict And Provides An Appropriate Vehicle For Its Resolution.

In this case, the Eleventh Circuit sided with the circuits that have "decline[d] to extend *St. Cyr* to aliens who were convicted after trial because such aliens' decisions to go to trial do not satisfy *St. Cyr*'s reliance requirement." App., *infra*, 29a. In so doing, the Eleventh Circuit expressly departed from the approach taken by the Third Circuit and since adopted by the Eighth Circuit. App., *infra*, 26a ("We decline to adopt the [Third Circuit] approach urged by Ferguson."). In addition, the court of appeals rejected the Tenth Circuit's rule that requires only objective reliance, holding instead that whether IIRIRA applies to pre-enactment convictions turns on petitioner's individual inability to prove "'transactions' or 'considerations already past' on which she relied." App., *infra*, 29a. The court, moreover, expressed some sympathy for the even stricter rule of the First, Fourth, Seventh, and Ninth Circuits, suggesting that the Eleventh Circuit may one day join them in holding that *St. Cyr* is categorically limited to the guilty plea context. *See* App., *infra*, 29a & n.28.

That circuit conflict is ripe for resolution by this Court at this time and in this case.

1. The Conflict is Entrenched and Important.

The circuit conflict is considered, longstanding, and entrenched. With the Eleventh Circuit's decision here, ten courts of appeals have now expressly considered and decided whether IIRIRA's repeal of Section 212(c) applies to pre-enactment convictions entered following a trial, rather than a guilty plea, and those decisions have produced a multi-tiered

conflict in the circuits from which the courts of appeals cannot disentangle themselves. The Eleventh Circuit made its decision in conscious rejection of the law adopted in the Third and Tenth Circuits. App., *infra*, 19a-22a, 29a. The Second, Third, and Tenth Circuits have similarly considered the conflicting rationales of other circuits, but have found them unpersuasive. *See Rankine v. Reno*, 319 F.3d 93, 102 (2d Cir. 2003); *Atkinson*, 479 F.3d at 227; *Hem*, 458 F.3d at 1191-1192. The Third Circuit, for example, although aware of its minority status, has continued to apply and reaffirm its rule in recent cases. *See, e.g., Williams v. Att'y Gen.*, No. 08-4179, 2009 WL 1510253, at *1 (June 1, 2009 3d Cir.); *Cespedes-Aquino v. Att'y Gen.*, 498 F.3d 221, 224-225 (3d Cir. 2007). And the Eighth Circuit recently adopted the same view as the Third Circuit, fully aware that it was joining the minority position. *Lovan*, 2009 U.S. App. LEXIS 16919, at *6-*7.

The Solicitor General has opposed certiorari in the past on the ground that the conflict "has diminishing prospective significance because it affects only removal proceedings for aliens convicted at trials before" 1996. Brief for the Respondent in Opposition at 13, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105. That argument fails for two reasons.

First, the government does not adhere to its own argument. The question here has the same significance and prospective import that the application of IIRIRA to plea bargains entered before 1996 had in *St. Cyr*. Yet in *St. Cyr*, it was the *government* itself that argued vigorously for and obtained this Court's certiorari review notwithstanding the purportedly "diminishing prospective significance" of the retroactivity question to pre-1996 plea bargains.

Moreover, while temporal limitations may appropriately influence the certiorari calculus in most contexts, it should not be accorded significance in cases involving the retroactive effect of federal statutes. That is because in every such case –

whether *St. Cyr*, *Hughes*, *Landgraf*, or *Martin v. Hadix*, 527 U.S. 343 (1999) – the question of a statute's retroactive effect is, by definition, of limited prospective significance.[5] Rather, when retroactivity is at issue, the more appropriate considerations are the sheer number of individuals affected and the severity of the impact. Both of those factors warrant this Court's exercise of its certiorari jurisdiction here.

The sheer number of circuit decisions – not to mention Board of Immigration Appeals cases – implicating the retroactive effect of IIRIRA's repeal of the Attorney General's discretionary waiver authority is a testament to its recurring importance and the significant reach a decision of this Court would have today and for a long time to come.[6]

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[5] Indeed, elsewhere the Government has not been deterred from seeking this Court's review of questions that are unlikely to recur or of arguably time-limited significance. *See, e.g.*, Petition for Writ of Certiorari, *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2007) (No. 07-308), 2007 WL 2608817 (seeking and obtaining review of question pertaining to tax refund claims for a tax the government had ceased to enforce years earlier); Petition for Writ of Certiorari, *United States v. Swisher Int'l, Inc.*, 531 U.S. 1036 (2000) (No. 00-415), 2000 WL 34000578 (seeking review of question of which statutory provision confers jurisdiction on the Court of International Trade to award refunds of a particular tax that had been found unconstitutional and therefore was no longer collected).

[6] The issue has arisen more than fifty-five times in the courts of appeals since *St. Cyr* was decided, many of these decisions in recent years. *See, e.g.*, *De Johnson v. Holder*, 564 F.3d 95 (2d Cir. 2009); *Nadal-Ginard v. Holder*, 558 F.3d 61 (1st Cir. 2009); *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009); *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009); *Lovan*, 2009 U.S. App. LEXIS 16919; *Esquivel v. Mukasey*, 543 F.3d 919 (7th Cir. 2008); *Singh v. Mukasey*, 520 F.3d 119 (2d Cir. 2008); *United States v. De Horta Garcia*, 519 F.3d 658, (7th Cir. 2008); *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008); *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008); *Manea v. Mukasey*, 301 F. App'x 589 (9th Cir. 2008); *Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008); *Lopez-Lopez v. Mukasey*, 285 F. App'x 440 (9th Cir. 2008); *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008);

Furthermore, the interests at stake are profound – the retroactivity question can be the difference between certain deportation after years, if not decades, of living and developing ties to the United States, and the opportunity for an immigrant to stay in her home and with her family. For example, in this case, Ms. Ferguson has lived in the United States for more than thirty years – nearly three-fourths of her life – and the "certain deportation" that application of IIRIRA

Morgorichev v. Mukasey, 274 F. App'x 98 (2d Cir. 2008); *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Atkinson*, 479 F.3d 222; *Carranza-De Salinas*, 477 F.3d 200; *Matian v. Mukasey*, 262 F. App'x 753 (9th Cir. 2007); *Singh v. Keisler*, 255 F. App'x 710 (4th Cir. 2007); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007); *Berishaj v. Gonzales*, 238 F. App'x 275 (9th Cir. 2007); *Cerbacio-Diaz v. Gonzales*, 234 F. App'x 583 (9th Cir. 2007); *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007); *United States v. Munoz-Recillas*, 224 F. App'x 621 (9th Cir. 2007); *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006); *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Kelava v. Gonzales*, 434 F.3d 1120 (9th Cir. 2006); *Garcia-Ortiz v. Gonzales*, 194 F. App'x 513 (10th Cir. 2006); *Rodriguez-Zapata v. Gonzales*, 193 F. App'x 312 (5th Cir. 2006); *Tecat v. Gonzales*, 188 F. App'x 308 (5th Cir. 2006); *Sidhu v. Gonzales*, 179 F. App'x 221 (5th Cir. 2006); *Evangelista v. Att'y Gen.*, 176 F. App'x 306 (3d Cir. 2006); *Pugliese v. Gonzales*, 174 F. App'x 601 (2d Cir. 2006); *Alvarez-Aceves v. Fasano*, 150 F. App'x 596 (9th Cir. 2005); *Crump v. Reno*, 130 F. App'x 500 (2d Cir. 2005); *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004); *Restrepo*, 369 F.3d 627; *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004); *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004); *Swaby v. Ashcroft*, 357 F.3d 156 (2d Cir. 2004); *Montenegro*, 355 F.3d 1035; *Trevor v. Reno*, 88 F. App'x 445 (2d Cir. 2004); *Rankine*, 319 F.3d 93; *Quinones-Saucedo v. Ashcroft*, 83 F. App'x 865 (9th Cir. 2003); *Jaw-Shi Wang v. Ashcroft*, 71 F. App'x 624 (9th Cir. 2003); *Raya-Baez v. INS*, 63 F. App'x 381 (9th Cir. 2003); *Garcia v. Fasano*, 62 F. App'x 816 (9th Cir. 2003); *Serrano-Salcedo v. Ashcroft*, 56 F. App'x 803 (9th Cir. 2003); *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2002); *Dias*, 311 F.3d 456; *Chambers*, 307 F.3d 284; *Armendariz-Montoya*, 291 F.3d 1116.

entails, *St. Cyr*, 533 U.S. at 325, will tear her away from her three children, her mother, and her five siblings, all of whom are U.S. citizens.

Second, the implications of IIRIRA's repeal are not as time limited as the Solicitor General's argument suggests because the government can initiate removal proceedings and invoke a prior conviction as the basis for removal without time limitation years and decades after the fact. In this case, the government waited more than a decade after Ms. Ferguson's conviction to initiate removal proceedings, and the government remains free years or decades from now to do the same against other immigrants based on youthful convictions. Individuals subject to deportation will continue to come to the government's attention through routine inspections of those returning from travel abroad, workplace raids, investigations of the alleged hiring of illegal immigrants, and arrests for subsequent offenses. Thus, the significance of the question presented here will endure for the entire lifespans of immigrants who were old enough to have committed a qualifying crime in 1995 or earlier. The expansiveness of that timeframe counsels in favor of certiorari review to bring stability and uniformity to the law for both the government and the individuals involved.

Third, the government's argument overlooks that confusion over the proper test for retroactivity and the role of reliance in it extends beyond the Section 212(c) context. In *Olatunji*, the Fourth Circuit confronted an analogous question of IIRIRA's application to a pre-enactment conviction where that conviction would have barred a lawful permanent resident's reentry into the United States. 387 F.3d at 386. The Fourth Circuit held – just as the Third Circuit had in *Atkinson* – that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." *Id.* at 388. In conflict with the Eleventh Circuit's decision here, *Olatunji* specifically held that "subjective reliance" should not be "relevant to the question of whether a particular statute is

impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor related to the presumption of congressional intent underlying the bar against retroactivity." *Id.* at 389.

Instead, tracking the Third Circuit's approach with respect to IIRIRA's repeal of Section 212(c), the Fourth Circuit held that whether the immigrant was convicted by way of guilty plea or jury trial was irrelevant to the retroactivity inquiry. What is relevant, the court held, is that "IIRIRA has attached new legal consequences to the *conviction*." *Olatunji*, 387 F.3d at 396.

The Fourth Circuit in *Olatunji*, moreover, expressly recognized the need for this Court's intervention, explaining that this Court's precedent "has generated substantial confusion as to whether a party must prove some form of reliance," and that "confusion extends throughout the Courts of Appeals." *Olatunji*, 387 F.3d at 390. Indeed, the government itself, the Fourth Circuit noted, "vacillated in response to the pointed question of whether reliance remains a requirement." *Id.* at 391.

Stressing that "[r]etroactivity is a question of congressional intent," *Olatunji*, 387 F.3d at 389, the Fourth Circuit echoed the Third Circuit's judgment that making the application of a single statutory provision vary based on the reliance conduct of individuals is "unsupported and unsupportable," *id.* at 394. "[T]here is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply" to pre-enactment events, the Fourth Circuit concluded. *Ibid.* "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Ibid.*

In *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007), the Ninth Circuit adopted a different view of the same provision, agreeing that it could in some cases have an impermissible retroactive effect but holding that immigrants

"making a *Landgraf* retroactivity argument cannot prevail if they cannot plausibly claim that they would have acted . . . differently if they had known about the elimination of [the] relief." *Id.* at 884 (quoting *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 939 (9th Cir. 2007)).

Indeed, disagreement and confusion over the role of reliance in retroactivity analysis pervade the interpretation of other immigration provisions as well. *See, e.g., Hernandez De Anderson*, 497 F.3d at 938 (noting, in the context of an analysis of INA Section 244(a)(2), that "*St. Cyr* has produced considerable disagreement among the courts of appeals concerning whether 'reasonable reliance' on pre-IIRIRA relief from deportation is a required element of a *Landgraf* claim to that relief and, if some form of reliance is required, what form it must take"); *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub, J., concurring) (noting, in the context of an analysis of INA Section 240A(d)(1), that "whether – and to what extent – a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed.") (quoting *De Horta Garcia*, 519 F.3d at 666 (Rovner, J., concurring)).[7]

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[7] *See also, e.g., Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (INA Section 240A(d) not "impermissibly retroactive" because no reliance established); *Hernandez v. Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) ("Because our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply, [*Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004)] and *Jimenez-Angeles* are distinguishable."); *Zuluaga*, 523 F.3d at 373, 375 (concluding that INA Section 240A(d)(1) "would not have an impermissible retroactive effect if applied to [petitioner's] 1995 offense" without considering reliance and noting that "[o]ur decision remains sound when reasonable reliance is taken into consideration"); *Hernandez De Anderson*, 497 F.3d at 941 (adopting the Tenth Circuit's objective reliance standard for INA Section 244(a)(2) retroactivity analysis and "hold[ing] that individuals demonstrate reasonable reliance on pre-IIRIRA law and

The questions presented thus are of wide-ranging and enduring importance both within and beyond the Section 212(c) context, and the widespread confusion in the law of the circuits warrants this Court's review.

2. This Case Properly Presents the Question for Decision.

Unlike prior petitions raising the question of Section 304(b)'s application to pre-enactment trial convictions, for which this Court's review has been denied, the present case provides a proper and timely vehicle for resolving the entrenched and expanding circuit conflict.

First, early petitions, some filed in the immediate aftermath of this Court's decision in *St. Cyr*, were premature.[8] There was no circuit split at all until 2004 when the Second Circuit adopted a subjective reliance standard, and the conflict became acute only in 2007, after the Tenth Circuit adopted its "objective reliance" standard, the Fifth Circuit adopted the subjective reliance standard, and the Third Circuit held that *St. Cyr* applies to all cases involving pre-1996 convictions. *Hem*, 458 F.3d at 1197; *Carranza-de Salinas*, 477 F.3d at 208; *Atkinson*, 479 F.3d at 230. Now, with the Eighth Circuit's adoption of the Third Circuit

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plausibly claim that they would have acted * * * differently if they had known about the elimination of [the] relief if it would have been objectively reasonable under the circumstances to rely on the law at the time") (internal quotation marks omitted); *see generally Rodriguez v. Peake*, 511 F.3d 1147, 1155 (Fed. Cir. 2008) ("[T]he D.C. Circuit appears to view the familiar considerations [of fair notice, reasonable reliance, and settled expectations] as akin to a tiebreaker in close cases.") (internal quotation marks omitted).

[8] *See, e.g., Garcia-Zavala v. Ashcroft*, 543 U.S. 813 (2004); *Binns v. Ashcroft*, 540 U.S. 1219 (2004); *Lawrence v. Ashcroft*, 540 U.S. 910 (2003); *Dias v. INS*, 539 U.S. 926 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

approach, the courts have fractured even further, and *Olatunji* establishes that the split is expanding into new contexts.

Second, the Government has previously opposed certiorari on the ground that courts should be given an opportunity to reconsider their positions in light of regulations issued in 2004.[9] But over five years after the regulations were issued, the circuit conflict shows no signs of abating and, in fact, has worsened significantly.[10]

Third, beyond the absence of a clear circuit split and the uncertain effect of the regulations, other petitions were plagued by vehicle problems. In some, there were serious questions whether the petitioner met the criteria for being considered for discretionary relief under Section 212(c), making the question presented potentially irrelevant to the petitioner's entitlement to relief,[11] and in others, the question was not squarely presented or the focus of the petition.[12]

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[9] *See, e.g.*, Brief for the Respondent in Opposition at 14-15, *Rodriguez-Zapata v. Gonzales*, 127 S. Ct. 2934 (2007) (No. 06-929), 2007 WL 1406224 (arguing that it would be "premature" for the Court to consider whether the rule in *St. Cyr* extends to immigrants convicted after trial because the Attorney General's final rule on the subject, *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004)), had only been considered by "a few courts"); Brief for the Respondent in Opposition at 9, *Hernandez-Castillo v. Gonzales*, 127 S. Ct. 40 (2006) (No. 05-1251), 2006 WL 2136237 (same).

[10] Indeed, several circuits have considered the regulations and expressly declined to change their positions. *See, e.g.*, *Nadal-Ginard*, 558 F.3d at 70 n.8; *Hernandez-Castillo v. Moore*, 436 F.3d at 519.

[11] *See, e.g.*, *Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008), *cert denied sub nom.*, *Cruz-Garcia v. Holder*, No. 08-878 (2009); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007), *cert denied sub nom.*, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008); Brief for the Respondent in Opposition at 6-7, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105 (arguing petition does not squarely present the question of the retroactive effect of Section 212(c)'s

This case suffers from none of those difficulties. It squarely presents the question of whether defendants convicted of a deportable offense after trial prior to the repeal of Section 212(c) are eligible for relief under that provision, and there is no dispute that petitioner would otherwise qualify for relief. Indeed, she is a strong candidate for relief, having served her sentence for a single crime committed over twenty-three years ago, having spent the past twenty-one years as a productive and law-abiding member of her community, and having developed strong family ties to the United States, through her three children, her mother, and her five siblings, who are all citizens. *See St. Cyr*, 533 U.S. at 296 (noting that "a substantial percentage" of applications for Section 212(c) relief were granted when it was available). Moreover, the question presented was pressed and thoroughly considered below, and the court of appeals' decision determined the outcome of the case.

Fourth, the government has argued in the past that cases involving immigrants who make no claim of actual reliance do not merit review because they do not implicate the conflict between courts requiring subjective and objective reliance. *See, e.g.*, Brief for the Respondent in Opposition at 11-12, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256. But that argument simply begs the question of whether reliance is an indispensable prerequisite to establishing that a statute has retroactive effect – a

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repeal); *Thom*, 369 F.3d at 164 n. 8 (noting that five-year bar might "independently preclude [petitioner] from 212(c) eligibility").

[12] *See, e.g.*, *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007), *cert denied sub nom.*, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008); Brief for the Respondent in Opposition at 7-8, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008) (No.07-866), 2008 WL 623189; Brief for the Respondent in Opposition at 12-15, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256 (discussing numerous other issues raised by petition).

predicate question to that which the government poses and on which the courts are deeply divided. Six circuits have held that reliance is entirely irrelevant – the Third and Eighth Circuits because the repeal of Section 212(c) has a retroactive effect even in the absence of reliance, and the First, Fourth, Seventh, and Ninth Circuits because they view *St. Cyr* as categorically limited to the plea-bargain context. Four other circuits – the Second, Fifth, Tenth, and Eleventh here – hold precisely the opposite, making reliance an indispensable prerequisite to relief under that provision. Moreover, confusion over the indispensability of reliance *vel non* has generated confusion in immigration law beyond the Section 212(c) context, as *Olatunji* illustrates.

In short, the division in the circuits on the role of reliance in retroactivity analysis is expanding. Contrary to the government's prior arguments, that conflict shows no evidence of dissipating in the Section 212(c) context and, in fact, is expanding into new aspects of immigration law. Moreover, the government continues and will continue for years to initiate removal proceedings that implicate the Section 212(c) retroactivity question. This Court's resolution of the conflict thus would bring stability and uniformity to the law – to the benefit of courts, immigrants, and the government.

II. The Court Of Appeals' Decision Is Wrong.

The Eleventh Circuit's decision also warrants review because it is wrong, contravening this Court's established jurisprudence in three significant respects.

First, the inquiry into whether IIRIRA Section 304(b)'s repeal of the Attorney General's waiver authority has retroactive effect entails a straightforward "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quoting *Martin*, 527 U.S. at 357-358) (internal quotation marks omitted). Here, IIRIRA attached a "new legal consequence[]" to

Ferguson's pre-enactment conviction – the legal effect of the conviction now is "certain deportation" rather than "possible deportation." *Id.* at 325. In that respect, the repeal of the waiver provision is indistinguishable from the repeal of the affirmative defense in *Hughes*. While the defendant may not have prevailed in the defense even if it remained available, for those defendants with no other viable defense, the repeal meant the difference between "certain" and merely "possible" liability. That change, the Court held, was sufficient to give the repeal retroactive effect. *Hughes*, 520 U.S. at 951-952.

To be sure, demonstrating reliance in prior decisionmaking could be one way of showing that a new legal consequence has attached to prior conduct. But nothing in this Court's articulation of the test for retroactivity mentions "reliance" or affords it the dispositive weight the Eleventh Circuit gave it here. Indeed, reliance is not even a required element for identifying *unconstitutional* retroactivity under the Ex Post Facto Clause. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 97 (2003) (identifying the traditional *Mendoza-Martinez* factors). There thus is no sound basis for the transcendence bestowed on that single factor by the Eleventh Circuit and some of its sister circuits. To the contrary, both *Landgraf* and *Hughes* found retroactive effect in the absence of any evidence of reliance.[13]

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[13] *See Hughes*, 520 U.S. at 951-952 (holding that an amendment to the False Claims Act that eliminated a defense to *qui tam* suits had an impermissible retroactive effect without citing any evidence of reliance by the company); *Hem*, 458 F.3d at 1193 (Supreme Court's decision in *Hughes* was made "without even a single word of discussion as to whether Hughes Aircraft – or, for that matter, similarly situated government contractors – had relied on the eliminated defense to its detriment") (quoting *Olatunji*, 387 F.3d at 391); *Landgraf*, 511 U.S. at 282-283 & n.35 (amendment to Title VII that permitted recovery of compensatory and punitive damages for certain violations had retroactive effect because it attached a new legal consequence to past conduct, even though "concerns of unfair surprise and upsetting expectations [we]re attenuated" because "intentional employment discrimination" "ha[d] been

The Eleventh Circuit ignored how IIRIRA significantly altered the legal consequence of Ferguson's almost-decade-old conviction, focusing instead on her purported "decision" to go to trial rather than to plead guilty. But, again, nothing in the retroactivity test prescribed by this Court from *Landgraf* forward forbids consideration of the law's effect on a past conviction or criminal conduct. To the contrary, those are traditional foci of retroactivity analysis. *See Smith v. Doe, supra*. Moreover, the plain text of IIRIRA makes the "conviction" the operative act for depriving the immigrant of the previously available opportunity to seek a waiver of deportation. *See* 8 U.S.C. § 1229b(a)(3) (foreclosing relief for immigrants "convicted" of aggravated felonies). "Applying the familiar retroactivity analysis to the past event of conviction, rather than the past decision to go to trial, reveals that IIRIRA and AEDPA imposed an obvious additional legal consequence on those previously convicted of an aggravated felony, *i.e.*., certain, instead of possible, deportation." *Thom*, 369 F.3d at 167 (Underhill, J., dissenting).

Second, even if reliance were a critical element, there is every reason to believe that immigrants who chose to go to trial rather than accept plea bargains did so in reasonable reliance on the continuing availability of Section 212(c) relief. As this Court noted in *St. Cyr*, it is well-established that aliens charged with crime "factor the immigration consequences of conviction in deciding whether to plead *or* proceed to trial." 533 U.S. at 322 (emphasis added) (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). The consequences of conviction thus can be weighed as much

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unlawful for more than a generation"); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that Section 101 of the Civil Rights Act of 1991 has retroactive effect because it "creates liabilities that had no legal existence before the Act was passed" without considering reliance).

in deciding to reject as to accept a guilty plea. Prior to Section 212(c)'s repeal, immigrants could reasonably believe that going to trial was the best way to avoid deportation, when accepting a plea to a deportable defense would subject them to immediate risk of deportation; going to trial might avoid that prospect if the jury failed to convict; and even if the jury convicted, the immigrant would have no lesser right to apply for relief under Section 212(c) than she would if she had pled guilty. Similarly, individuals convicted after Congress foreclosed section 212(c) relief for those who served more than five years would have reasonably relied on the present state of the law in rejecting a plea bargain that required or risked a sentence that would render them ineligible under the 1990 statute.

Accordingly, there is no basis for the categorical rejection of *St. Cyr*'s application to those convicted after trial. Nor does it make sense to require immigrants to prove actual, subjective reliance. The Court required no such individualized showing in *St. Cyr*, even though it is entirely possible that some immigrants would have pled guilty for reasons entirely unrelated to the availability of Section 212(c) relief (especially those aliens whose equities made a waiver unlikely). Nor did the Court require courts to inquire into the minds of the defendants in *Landgraf* or *Hughes*. Furthermore, in practice, a subjective test is entirely unworkable given the rule against introducing plea offers into evidence, *see* Federal Rule of Evidence 410, the informality of such discussions in many state prosecutions, and the years if not decades that can elapse (as occurred here) between the decision to go to trial and the federal government's commencement of removal proceedings.

Third, the Eleventh Circuit's decision overlooks this Court's precedent holding that a single statutory provision cannot be construed to have different meanings based on the factual circumstances of the immigrant before the court. In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court held that the Immigration and Nationality Act's detention provision, 8

U.S.C. § 1231(a)(6), must be given the same meaning when applied to excludable as well as deportable aliens. *Id.* at 378-381. Because the statutory text admitted of no distinction between those groups, the Court held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378. In so holding, the Court acknowledged that its prior decision limiting the scope of detention for deportable aliens in *Zadvydas v. Davis*, 533 U.S. 678 (2001), had reserved the question whether its holding would extend to excludable aliens. *Clark*, 543 U.S. at 378. But the Court explained that, once confronted with the question of the provision's application to excludable aliens, the absence of any textual distinction compelled the "same answer." *Id.* at 379.

Likewise here, the government's effort to defend and leave in place the factually variable retroactivity rules now applied by the courts of appeals simply rehearses its failed effort in *Clark* to give "the *same* [statutory] provision a different meaning when [different] aliens are involved." 543 U.S. at 380. Whether Section 304(b) attaches a new legal consequence to pre-enactment convictions is a question of statutory construction and, as in *Clark*, nothing in "the operative language" of that provision "differentiat[es]" the scope of its operation or the legal effect of the repeal on an immigrant's ability to seek previously available discretionary relief based on how an immigrant's conviction was obtained. *Id.* at 378.

While the reliance interests of those convictions obtained through guilty pleas certainly informed the Court's judgment in *St. Cyr* – just as the legal and constitutional interests of deportable aliens informed the Court's original decision in *Zadvydas* – having decided that Section 304(b) does not apply to pre-enactment convictions obtained by plea, "the same answer" must apply to convictions obtained by trial. *Clark*, 543 U.S. at 379. Not only do convictions obtained through trial commonly implicate the same type of

reliance and other legal interests as guilty pleas, but beyond that, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications" might implicate different analyses. *Id.* at 380. "The lowest common denominator, as it were, must govern." *Ibid.* Thus *St. Cyr*'s holding as a matter of statutory construction that Section 304(b) does not apply to a pre-IIRIRA conviction should control here because, whether obtained through plea or trial, Section 304(b) attaches new legal consequences to pre-enactment convictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2009